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In The

Supreme Court of the United States

October Term, 1949

No.....

WILLIAM TURPIN, JR.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

I. OPINION OF THE COURT BELOW.

The opinion of the supreme court of Wisconsin is set forth in the petition for the writ of *certiorari* at pages 4 to 8 and also in the transcript of the record at pages 19 to 21. It is reported in 255 Wis. 358, 38 N. W. 2d 495.

II. JURISDICTION.

Respondent opposes the granting of a writ of *certiorari* on the grounds that the case is moot and that no federal question is presented.

III. NATURE OF THE CASE.

Petitioner seeks review of a judgment of the supreme court of Wisconsin affirming an order of the circuit court for Richland county, Wisconsin, in the criminal case of *State of Wisconsin v. William Turpin, Jr.*, denying the petitioner's applicant for a writ of error *coram nobis*.

The opinion below holds that the writ of *habeas corpus* affords a proper remedy to raise the question whether the defendant was denied due process of law by the failure to appoint an attorney to represent him or to advise him of his right to such appointment. It holds further that the writ of error *coram nobis* is not a proper remedy to raise that question.

The decision of the Wisconsin supreme court was filed July 12, 1949. Unknown to the petitioner and to counsel on either side of the case, on July 6, 1949 the petitioner's sentence expired by reason of credit for "good time" pursuant to the applicable Wisconsin statute, and the Wisconsin state department of public welfare issued him a final discharge from parole (petitioner's brief p. 17).

IV. STATEMENT OF FACTS.

On August 22, 1945 the petitioner was convicted on his plea of guilty in the county court for Richland county, Wisconsin, of charges of larceny of an automobile and of operating an automobile without the owner's consent, and was sentenced to two consecutive terms of not less than one nor more than three years in the state prison at Waupun, Wisconsin. The record does not disclose that the court advised him, prior to his plea of guilty, of his right to ap-

pear by counsel and to have counsel appointed for him at the expense of the state (R. 4, 6).

On July 17, 1946, upon the application of petitioner, Honorable Walter S. Goodland, Governor of Wisconsin, made an order commuting the said two sentences to run concurrently instead of consecutively (R. 6-7).

A motion for a writ of error *coram nobis* returnable December 7, 1948 was made by counsel for petitioner. Attached to the motion was the affidavit of petitioner sworn to in Westchester county, New York, on November 26, 1948 (R. 8-10). Issue was joined on this motion and the matter was transferred to the circuit court where it was heard on affidavits. Honorable A. W. Kopp, circuit judge, made and filed his decision denying the motion for the writ of error *coram nobis* on January 4, 1949 (R. 15-16) and on January 19, 1949 a formal order denying the motion was entered (R. 16-17).

The records of the state department of public welfare, of which the Wisconsin supreme court takes judicial notice, showed that the defendant was released on parole from the state prison on December 12, 1946 and was permitted to go to New York for supervision pursuant to the interstate compact for out-of-state parolee supervision, section 57.13, Wisconsin Statutes 1945, to which the states of New York and Wisconsin are both signatories. While being supervised in New York, defendant was indicted in Queens county, New York, on May 29, 1947 on a charge of grand larceny in the first degree committed April 22, 1947. On May 14, 1947 his Wisconsin parole was revoked. On November 20, 1947 he pleaded guilty in the Queens county court to an information charging attempted grand larceny in the second degree was sentenced to 2 to 4 years in the

state prison. He was released from Sing Sing Prison on May 11, 1949 on parole, at which time his Wisconsin parole was reinstated and supervision by the New York parole authorities on behalf of Wisconsin was resumed jointly with supervision on his New York parole. It therefore appears that petitioner was serving a New York sentence in Sing Sing Prison at the time that he made the petition for the writ of error *coram nobis* in the county court for Richland county, Wisconsin.

On July 6, 1949 the state department of public welfare of Wisconsin discharged petitioner from parole by reason of the expiration of his Wisconsin sentence, and the state of Wisconsin has no further interest in the petitioner. It is asserted in petitioner's brief (p. 17) that he is now again in Sing Sing Prison for a violation of parole and is serving his sentence of 2 to 4 years imposed by the Queens county court. As to this the undersigned have no knowledge.

V. ARGUMENT.

A. THIS COURT DOES NOT DECIDE MOOT OR ABSTRACT QUESTIONS OF LAW ON REVIEW OF DECISIONS OF STATE COURTS.

As pointed out in the statement of facts, the petitioner has been discharged from his Wisconsin parole and the state of Wisconsin has no further interest in him by reason of his 1945 conviction in the Richland county court. He may return to Wisconsin as soon as his obligations to the state of New York are satisfied, knock on the gates of the Wisconsin state prison and he will not be admitted. He may submit himself to supervision by Wisconsin parole authori-

ties and he will be rejected. He may submit monthly reports to his Wisconsin parole officer and they will be sent back. Wisconsin is absolutely through with the petitioner. Unless he returns and commits further crimes in Wisconsin, his future is a matter of profound indifference to the respondent. Wisconsin is not now depriving him of liberty either with or without due process of law.

It follows that there is no longer any controversy between the petitioner and respondent which is capable of judicial determination; that the case is therefore moot; and that this court will not review it on *certiorari*.

> *Chandler v. Wise*, (1939) 307 U. S. 474, 59 S. Ct. 992, 83 L. ed. 1407, and cases cited below.

It is true that the fact which makes the case moot does not appear of record, but it is established that such fact may be shown by statements of counsel *dehors* the record.

> *Buck's Stove and Range Co. v. American Federation of Labor*, (1911) 219 U. S. 581, 31 S. Ct. 492, 55 L. ed. 345.

There is some suggestion in petitioner's brief, p. 16, that his Wisconsin conviction increased the penalty which was imposed upon him by the Queen's county court for his subsequent offense, on the ground that it made him a second offender. Counsel do not state how he could get his New York sentence reduced if the Wisconsin conviction were to be set aside upon a writ of error *coram nobis*. But even assuming that some remedy exists in the state of New York for obtaining such reduction of his New York sentence, that would not be sufficient to give this court jurisdiction of an otherwise moot case. This court has held

that it will not decide a moot case even though the judgment appealed from may bind the petitioner as a determination of his or her status.

> *Kimball v. Kimball,* (1899) 174 U. S. 158, 163, 19 S. Ct. 639, 43 L. ed. 932, 934.

And the same rule has been applied by this court where it was claimed that the judgment below was being relied on as *res adjudicata* in another suit between the parties.

> *American Book Co. v. Kansas,* (1904) 193 U. S.49, 52, 24 S. Ct. 397, 48 L. ed. 613, 614.

It is therefore respectfully submitted that the petition be denied on the ground that the case is moot.

B. QUESTION OF STATE PROCEDURAL LAW ONLY IS PRESENTED.

The petitioner's position amounts to this: That the state of Wisconsin is bound not only to afford him some remedy to vindicate his alleged federal right, but that it must afford him a remedy in the form selected by him, namely the writ of error *coram nobis.*

It need hardly be pointed out here that the question sought to be raised by petitioner in the state court scarcely fits the calls of the common-law writ of error *coram nobis* as preserved in the state of Wisconsin. The reasons are amply stated in the opinion of the court below. Some few states have expanded the function of the writ to include such cases, but respondent has not.

In Wisconsin, after the time for appeal has expired, the question may be raised by a writ of *habeas corpus*. See cases cited in opinion below.

It is true that the petitioner cannot avail himself of the *habeas corpus* remedy for the reason that he is not and was not in custody in the state of Wisconsin. This was due to his own act. He first treated his conviction and sentence as valid by applying to the governor for executive clemency, which he received in the form of a commutation of his sentence. He next treated his Wisconsin sentence as valid by applying for and receiving parole. As a further act of grace, the state of Wisconsin permitted him to return for parole supervision to his home state of New York. While there he committed a further crime, to which he pleaded guilty and for which he was sentenced to Sing Sing Prison. It was this combination of circumstances which put beyond his reach the remedy afforded by the state of Wisconsin by a writ of *habeas corpus*.

Moreover, we do not understand that this court has ever held that it is an absolute duty that the state furnish a remedy whereby a prisoner may raise the federal question sought to be raised here. If the state fails to furnish such a remedy, the only consequence is that the prisoner may then resort to the federal district court for the relief to which he claims to be entitled.

> *Ex parte Hawk,* (1944) 321 U. S. 114, 64 S. Ct. 448, 88 L. ed. 572.

It is therefore apparent that the decision below rests upon an adequate nonfederal ground. The federal question

sought to be raised was not even considered by the court below.

It is therefore submitted that the writ of *certiorari* should be denied for the foregoing reasons.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1949.

No. 469

WILLIAM TURPIN, JR.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

Reply to Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

WILLIAM TURPIN, JR., *Petitioner,* v. STATE OF WISCONSIN, *Respondent.*	No.....

Reply to Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin.

The petitioner herein, replying to the brief submitted in opposition to petition for a writ of certiorari in the above entitled matter, with respect to Paragraph V—Argument:

> "A. This Court does not decide moot or abstract questions of law on review of decisions of State Courts."

urges that this is not a moot question. The petitioner is now in prison serving a sentence as a second offender for the reason that the illegal conviction had August 22nd, 1945, in the County Court of Richland County, Wisconsin, increased the punishment on his conviction in the Queens County Court of New York.

The conviction in the County Court of Richland County, Wisconsin, could not be attacked collaterally in the Queens County Court of New York, and to all intents and purposes was a valid conviction and the County Court was

compelled to treat it as such at the time of imposition of sentence.

> *The People of the State of New York,* Respondent v. *Basil McCullough,* Appellant; Decided December 2nd, 1949 (Not Reported) Law Journal, New York, December 30th, 1949 (and cases cited therein).

Petitioner replying to Paragraph B.

> "Question of State procedural law is presented."

urges that petitioner does not take the position that the State of Wisconsin must afford him a remedy in the form selected by petitioner.

The Attorney General of the State of Wisconsin takes the position that the petitioner could not avail himself of the writ of habeas corpus for the reason that he is not now, and was not at the commencement of this proceeding in the County Court of Richland County, Wisconsin, within the State of Wisconsin in legal custody.

Petitioner could not sue out a writ of error or appeal for the time to commence such proceedings is governed by statute and had expired.

> Statutes of Wisconsin:
> Appeals in criminal cases; Sec. 358.13.

The only remedy left to petitioner was a petition for a writ of error *coram nobis.*

The Supreme Court of Wisconsin, in its opinion, states that habeas corpus affords a complete remedy. It is apparent that the petitioner has no such remedy for the reason that he is not restrained of his liberty in the State of Wisconsin, and was not so restrained at the commencement of this proceeding in the County Court of Richland County, Wisconsin.

> Statutes of Wisconsin:
> Habeas Corpus, Sec. 292.01.

The Attorney General of the State of Wisconsin, in his brief submitted in opposition to this petition, takes the position that petitioner could not resort to habeas corpus for relief (p. 7).

The Attorney General states that the question sought to be raised by the petitioner cannot be raised by the common law writ of error *coram nobis* (p. 6).

If this statement of the Attorney General is correct then the State of Wisconsin provides no mode for redressing the wrong suffered by petitioner, and in such case this Court will take jurisdiction to inquire into whether the petitioner has been denied counsel or the assistance of counsel under circumstances which constitute an infringement of the United States Constitution.

> *Carter* v. *Illinois,* 329 U. S. 173, 176;
> *Ex parte Hawk,* 321 U. S. 114;
> *House* v. *Mayo,* 324 U. S. 42.

The Supreme Court of the State of Wisconsin, in its opinion, bases its refusal to reverse the decision of the Circuit Court upon insubstantial and insufficient grounds. The opinion discloses that the Court considered the federal question raised by the petitioner.

> "Assuming, without deciding, that the defendant's rights were violated by the acceptance of the plea of guilty without first appointing counsel or having a waiver, we are of the opinion that a writ of error *coram nobis* is not a proper remedy."

In talking about "defendant's rights" the Court considered the rights of petitioner under the Fourteenth Amendment of the Constitution of the United States, as well as his rights under the laws and the Constitution of the State of Wisconsin.

It is well settled that where the independent grounds upon which a case is decided is not a substantial or suffi-

cient one, it will be presumed that the State Court based its judgment on the law raising the federal question and the United States Supreme Court will then take jurisdiction.

The opinion of the Supreme Court of Wisconsin, stating that the writ of habeas corpus affords this petitioner a complete remedy in this case is meaningless, for an examination of the facts, together with an examination of the law relating to the issuance of writs of habeas corpus will disclose that the petitioner could not petition the Supreme Court of the State of Wisconsin for the issuance of a writ of habeas corpus for the reason that he was not deprived of his liberty within the State of Wisconsin at the commencement of this proceeding.

Klinger v. *Missouri*, 13 Wall. 257, 263;
Wood Mowing & Reaping Machine Co. v. *Skinner*, 139 U. S. 293, 297;
Allen v. *Arguimbau*, 198 U. S. 149;
Lynch v. *New York*, 293 U. S. 52.

The United States Supreme Court may issue certiorari to review the questions raised on this application.

Powell v. *Anderson*, 287 U. S. 45.

Respectfully submitted,

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